IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4393/2007

Major General B.P.S. Mander ...Petitioner through Mr. N.K. Kaul, Sr. Adv. with Mr. Viraj R. Datar, Mr. Amit Kumar Singh, Ms. Shikha Sarin and Mr. Karun Mehta, Advs.

Versus

Union of India & Ors. ...Respondent through Mr. Sanjeev Sachdeva, Adv.

Date of Hearing : August 30, 2007

Date of Decision : September 03, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

: VIKRAMAJIT SEN, J.

J U D G M E N T

1. The Petitioner, who is presently holding the substantive rank of Major General in the Indian Army, has filed this writ petition praying for the quashing of the Order dated 26.9.2005 (revised on 10.10.2005) convening a Court of Inquiry; setting

aside the Recommendations of the said Court of Inquiry; quashing the decision for taking administrative action against the Petitioner; and for directing the Respondents to promote the Petitioner to the rank of Lt. General with effect from 1.10.2006 in accordance with the Recommendations of the Special Selection Board (SSB) held in April, 2006 as approved by the Appointments Committee of the Cabinet (ACC).

2. The Petitioner was commissioned in the Indian Army in the Army Service Corps (ASC) on 15.6.1969, had been promoted to the rank of Major General, and is posted as Additional Director General (Supply and Transport) since April, 2005. He was detailed to appear in a Court of Inquiry as a witness. The Respondents have admitted that the Petitioner was considered by the SSB held on 7.4.2006 for promotion to the rank of Lt. General in respect of the vacancy which was to arise on 1.10.2006. It has further been asseverated in the Counter Affidavit that “due to the involvement of the Petitioner in a case the Competent Authority gave directions on 24.6.2006 for initiation of administrative action against the Petitioner for various lapses committed by him in procurement of dry rations. Consequently, a Discipline Vigilance (DV) Ban was imposed

against the Petitioner owing to said involvement. Therefore, the SSB result which had been approved earlier by the Competent Authority was rescinded and Respondent No1 has directed that the result of the petitioner shall be subject to outcome of DV Ban case. Thus the result has not been finalised and notified as per DV Ban confidential policy dated 04 July 2000". On an analysis of the statement of the witnesses and the documents produced at the Court of Inquiry thirteen (13) Army personnel including the Petitioner were found prima facie blameworthy for their improprieties. The senior-most officer was Lt. General S.K. Sahni, who has since retired. The Respondents have themselves also pleaded in their Counter Affidavit that the case of the Petitioner is different from that of Lt. General Sahni in that no complaint was filed against the Petitioner by any person.

3. Lt. General Sahni had approached this Court by way of WP(C) 11839/2006 which was decided in his favour by a detailed Judgment dated 11.1.2007 (in Lt. General Surinder Kumar Sahni -vs- Chief of Army Staff, MANU/DE/0613/2007, hereinafter referred to as ***SAHNI***. Admittedly, an Appeal has not been filed against the said Judgment and it attained finality. The operative part of the Judgment of the Division Bench

comprising Justice Swatanter Kumar (as the Chief Justice of Bombay then was) and Justice G.S. Sistani, observed that the Respondents had not complied with the provisions of Rule 180 of the Army Rules, 1954 and for this reason they could not take any further proceedings against Lt. General Sahni on the basis of that Court of Inquiry. Our learned Brothers, however, had ordered that the Respondents are at liberty to continue with the proceedings under Rule 180 after giving notice to the Petitioner, or in the alternative, take recourse to Rule 22, or exercise any other power available to them under the Act provided they do not rely upon the proceedings of the said Court of Inquiry. We shall avoid making our Judgment prolix by referring to the reasoning in the ***SAHNI*** with which we are in respectful and complete agreement. We may succinctly record that our learned Brothers had concluded that the Respondents had transgressed the mandates of Rule 180. It is trite that ***SAHNI*** can be relied upon by the Petitioner only so long as the facts pertaining to his case are similar thereto in essential features. Learned counsel for the Petitioner has contended that ***SAHNI*** would *a fortiori* apply in favour of the Petitioner as his case is even on a higher pedestal since the Respondents have admitted in their Counter Affidavit that no witness had deposed against him.

4. Rule 180 is reproduced for facility of reference:

> **180. Procedure when character of a person subject to the Act is involved.--** Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witness in defence of his character or military reputation. The presiding officer of the court shall take such steps as maybe necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule.

5. In addition to the analysis of the law already made by the Division Bench in ***SAHNI*** it would be advantageous and informative to refer to the celebrated decision of *Ernesto A.* ***Miranda*** *v. State of Arizona*, 16 L.Ed. 2d 694(1966) in which the Supreme Court of the United States of America reiterated the settled position that "... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates

the use of procedural safeguards effective to secure the privilege against self-incrimination ....". Justice Warren had further opined that "As a constitutional prerequisite to any questioning, an individual held for interrogation by a law enforcement officer must be warned, in clear and unequivocal terms, that he has a right to remain silent, that any statement he does make may be used as evidence against him." We are fully mindful that the factual matrix in ***Miranda*** is not identical with that before us. However, the *ratio decidendi* would apply invariably to all interrogations. It is to be appreciated that the Order convening the Court of Inquiry rightly records in paragraph 8 that Army Rule 180 must be complied with whenever applicable. It appears to us to be unexceptional that a person cannot be surprised, tricked or induced into participating in an Inquiry without being informed that its findings may be against him or be critical to his future. Criminal jurisprudence in all common law systems prohibit compelling an accused to depose against himself; an accused can choose to remain silent without any adverse inference being drawn against him because of his reticence. As has already been noted the Petitioner was one of the last witnesses to be examined in the Court of Inquiry constituted to

investigate into the complaints pertaining to the quality of dry rations purchased for the consumption in the Indian Army.

6. We can conceive of a situation where at the commencement of a Commission of Inquiry no culprits may have been identifiable. In the course of the Inquiry, the deposition of witnesses and/or document and material on record may provide the foundation on which the case of complicity of some of the officers could prima facie be made out. As has been opined by our learned Brothers in ***SAHNI*** at the very first instance when the needle of suspicion was perceived to point at a particular person, such as the petitioner in the present case, this situation should have been immediately brought to his specific notice. He should have thereupon been cautioned, in the ***Miranda*** mould, that any statement made by him thereafter may be used to his disadvantage or detriment. Similarly, if on the basis of any document or material in the possession of the Court of Inquiry an adverse conclusion had been drawn against the Petitioner, this material and documentation should have been placed before the person concerned. He should be given an opportunity of responding to the accusation, if he had so chosen, and only thereafter could a prima facie view be taken which could form

the foundation for separate criminal or administrative action. Rule 180 partakes the proportions of a *grundnorm* of natural justice which commands compliance and brooks no deviation or departure. It is yet another manifestation of *audi alteram partem* rule, namely, that no man should be condemned unheard. One of the greatest conceivable condemnations is for a person to be denied the privileges and pleasures of reaching the pinnacle of his career which in the present case has been arrived at after over 35(thirty five)years of service.

7. Returning to the facts of the present case we are of the view that the Petitioner is avowedly better placed than Lt. General Sahni against whom, as Respondents have pleaded, some complaint had been received. So far as the the Petitioner is concerned he had participated in the Court of Inquiry only as a witness, never suspecting or apprehending that the findings of the Court of Inquiry would be damning to his promotional prospects. We cannot, therefore, appreciate the argument of learned counsel for the Respondents that Rule 180 did not apply in the Petitioner's case. Whereas Lt. General Sahni may have had some inkling into the possible consequences of the Commission of Inquiry, and therefore, would have been alert to

claim the protection of Rule 180, such thoughts would not have even entered the mind of the Petitioner. We should not be understood to mean that it is for the accused to claim protection of Rule 180 nor can we attempt to do so. The Supreme Court has unequivocally enunciated that the law casts an inalienable obligation on the Respondents to adhere to the mandate of Rule 180. Our general experience indicates that in far too many cases a confession is recorded in Courts-Martial with the simultaneous notings that the accused has refused to append his signatures to the records. The two positions are essentially not compatible, leading to the suspicion that the confession may not have been volunteered at all. We can only recommend that the Respondents should take care to collect evidence corroborating a confession so that Courts do not view such admissions of guilt as convenient coincidences. Pains should always be taken to inform the person concerned of the consequences of his confession.

8. Personnel of the Armed Forces are entitled as much as any other citizen to the protection of the Constitution of India. The Supreme Court had observed over thirty years ago and reiterated regularly thereafter (yet regretfully unheeded by the

Respondents) that service in the Armed Forces can no longer be viewed as a support or adjunct of the Rulers. We cannot do better than to reproduce the following extract from the decision in *Lt. Col. Prithi Pal Singh Bedi -vs- Union of India,* (1982) 3 SCC 140:

> 44. Reluctance of the apex court more concerned with civil law to interfere with the internal affairs of the Army is likely to create a distorted picture in the minds of the military personnel that persons subject to Army Act are not citizens of India. It is one of the cardinal features of our Constitution that a person by enlisting in or entering Armed Forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution. More so when this Court held in Sunil Batra v. Delhi Administration, that even prisoners deprived of personal liberty are not wholly denuded of their fundamental rights. In the larger interest of national security and military discipline Parliament in its wisdom may restrict or abrogate such rights in their application to the Armed Forces but this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty-oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be preceded by an enquiry

ensuring fair, just and reasonable procedure and trial by a judge of unquestioned integrity and wholly unbiased. A marked difference in the procedure for trial of an offence by the criminal court and the court martial is apt to generate dissatisfaction arising out of this differential treatment. Even though it is pointed out that the procedure of trial by court martial is almost analogous to the procedure of trial in the ordinary criminal courts, we must recall what Justice William O'Douglas observed : "[T]hat civil trial is held in an atmosphere conducive to the protection of individual rights while a military trial is market by the age-old manifest destiny of retributive justice. Very expression 'court martial' generally strikes terror in the heart of the person to be tried by it. And somehow or the other the trial is looked upon with disfavour." In Reid v. Covert, Justice Black observed at page 1174 as under:

> Courts martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence". In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings – in short, for their future progress in the service. Conceding to military personnel that

high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of courts. Submission that full review of finding and/or sentence in confirmation proceeding under Section 153 is provided for is poor solace. A hierarchy of courts with appellate powers each having its own power of judicial review has of course been found to be counter-productive but the converse is equally distressing in that there is not even a single judicial review. With the expanding horizons of fair play in action even in administrative decision, the universal declaration of human rights and retributive justice being relegated to the uncivilised days, a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non-military personnel or civil personnel. Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace-loving citizens enjoy a social order based on rule of law; the same cannot be denied to the protectors of this order. And it must be realised that

> an appeal from Ceaser to Ceaser's wife – confirmation proceeding under Section 153 – has been condemned as injudicious and merely a lip sympathy to form. The core question is whether at least there should be one appeal to a body composed of non-military personnel and who would enjoy the right of judicial review both on law and facts as also determine the adequacy of punishment being commensurate with the gravity of the offence charged. Judicial approach by people well-versed in objective analysis of evidence trained by experience to look at facts and law objectively, fair play and justice cannot always be sacrificed at the altar of military discipline. Unjust decision would be subversive of discipline. There must be a judicious admixture of both.

9. It is legally impermissible to obliquely or indirectly come to a conclusion from statements of the accused that they are willing to forfeit their valuable rights under Rule 180. The decision to depart from compliance of Rule 180 should not be opaque, but should be transparent and crystal clear. The Authorities should invariably offer the protection of Rule 180 to the accused or delinquent and only after the passage of a reasonable time, so as to obviate a charge of coercion, should they accept his statement that he does not want adherence of his legal rights enshrined in Rule 180. We say this because

learned counsel for the Respondent has made a futile attempt to read a letter written by the Petitioner to Lt. General Sahni as evidencing the voluntary relinquishment of protection of Rule 180. The Petitioner had recorded some event that had transpired in these words - "I was contacted initially by Lt Gen VC Jain, who said they wished to apply AR 180. I told him that it would not be appropriate at this stage since the recording of all Statements was over. He then handed me over to Lt Gen Mohinder Puri, who said that this was a routine procedure and that he would send the Staff Officer with all the Statements and I could go through them. I told him that I could read the Statements but would not be privy to the discussions that had taken place during the recording of the Statements. I also asked him about what were the changed circumstances that now warranted application of AR 180 since all Statements had been recorded and AR 180 applied on all those considered necessary. He said that it was only a routine. I did not hear anything from him after that".

10. In September 2005 the Petitioner had been detailed to appear as a witness in the Court of Inquiry, which was not directed against any misdemeanours attributable to him. It is of

significance that the option to avail of Rule 180 was specifically given to as many as nine (9) witnesses who deposed in the Court of Inquiry. On 9.3.2006, that the Petitioner was promoted to the rank of Major General. The Petitioner asserts without challenge that in June, 2006 the Selection Board had approved his promotion to the rank of Lt. General, which in that very month also received the clearance of the ACC. In October, 2006 a vacancy had arisen to which the Petitioner was eligible. The Division Bench held in favour of Lt. General Sahni in January, 2007. Since the results of the Selection Board had not been de-classified, the Petitioner submitted a Representation on 21.2.2007, which remains unanswered. On 19.3.2007 the Petitioner filed another Representation on learning that a fresh Selection Board had been convened. The first communication from the Respondents to the Petitioner is in terms of Show Cause Notice dated 15.6.2007 issued by the Headquarters Western Command. It inter alia states that a perusal of the Court of Inquiry proceedings reveals that the Petitioner while being responsible for provisioning centrally procured dry supplies for the Defence Forces had omitted to process the case for getting the samples of Masur Whole; had failed to ensure timely materialisation in respect of Kabli Chana; had omitted to

include crucial quality aspects in the terms of reference, etc. etc. We find it noteworthy that the procurement was not from private parties but admittedly from the Public Sector Undertakings (PSUs). However, we should not be misunderstood to even obliquely indicate that there was any legal impropriety in the issuance of the Show Cause Notice dated 15.6.2007, or any follow-up proceedings predicated thereon.

11. What must be determined in the present case is whether there was sufficient material available with the Respondents to render nugatory the approval of the Selection Board as well as the clearance of the ACC in June 2006. The unqualified answer is that there was none at all. By January, 2007 the decision of the Division Bench in ***SAHNI*** had made it unequivocally clear that the Respondents had violated the dictates of Rule 180 and hence the Court of Inquiry could not be relied upon at all. It is true that this decision was rendered in relation to Lt. General Sahni; if that was not so there would have been no alternative but to initiate Contempt of Courts proceedings against the Respondents. The Respondents' stand is that even on the commencement of the proceedings of the Court of Inquiry Lt.

General Sahni was under suspicion. As we have already observed compliance with Rule 180 was even more critical so far as the Petitioner was concerned since he was not under any suspicion. We find no valid explanation forthcoming for the inordinate delay of six months from the ***SAHNI*** Judgment for the issuance of the Show Cause Notice to the Petitioner assuming that the Respondents were in possession of reliable information or evidence or documents or other material showing complicity of the Petitioner. The Respondents should already have been aware that reliance only on the Court of Inquiry proceedings was insufficient to take any punitive action against the Petitioner who was much more soundly placed than Lt. General Sahni. The Respondents should have kept in mind the fact that implementation of the approval of the Petitioner's promotion to the rank of Lt. General was long overdue and in the normal course should have effected in October, 2006 when a vacancy had arisen.

12. It has become an odious practice, to which Authorities routinely succumb, to initiate anonymous or pseudonymous complaints against the person who is in the reckoning for promotion. It is axiomatic that there must be sound and legally

admissible evidence available with the Authority before any officer or employee is denied his promotion. In the present case we reiterate and reaffirm that there was none at the time by which the Petitioner's promotion was rescinded. The Respondents state that in the course of his statement the Petitioner had incriminated himself. If this were so a Show Cause Notice should have been issued forthwith and an Inquiry or Court-martial should have been commenced against the Petitioner. The outcome of such proceedings could then have led to the Petitioner being charged for specific offences. Only then would Rule 180 have been legally satiated. It appears to us that a DV Ban should not also be imposed without sufficient cause. We find it futile for learned counsel for the Respondents to rely on *Union of India -vs- R.S.* ***Sharma***, (2000) 4 SCC 394 since in that case a First Information Report (FIR) with serious allegations of financial misdemeanours was already registered. Respondents' reliance on the Division Bench Judgment in *J.P.S.* ***Malha*** *(Col.) -vs- Union of India*, 110(2004) DLT 372 is of no avail. In that case, the DV Ban had been imposed even prior to the empanelment of the officer concerned. Moreover, the ***Malha*** did not consider the decisions of the Hon'ble Supreme Court in *Union of India -vs- K. V.* ***Jankiraman***, (1991) 4 SCC

109, *Union of India -vs-* ***Dr Sudha Salhan***, (1998) 3 SCC 394, *Bank of India -vs-* ***Degala Suryanarayana***, (1999) 5 SCC 762 and *The State of Madhya Pradesh -vs-* ***Bani Singh***, AIR 1990 SC 1308. ***Sharma's*** case cannot be equated with ***Jankiraman*** where it was observed that Sealed Cover Procedure can be resorted to only after a charge-memo is received or a charge-sheet is filed. Otherwise, the Government employee cannot be denied his promotion. This exposition of the law had been reiterated in ***Dr Sudha Salhan*** and ***Degala Suryanarayana***. In ***Bani Singh*** the Apex Court held it to be illegal to defer consideration of an officer for promotion by a Screening Committee in circumstances where some complaints about his integrity had been received but in respect of which not even a Preliminary Inquiry had been completed. In the case before us the DV Ban appears to have been imposed on 13.7.2006 which is subsequent to the approval of the promotion of the Petitioner to the rank of Lt. General. Such Bans should not be recklessly imposed on unsubstantiated grounds, else the morale and efficiency of the Army or the Administration would be dealt a fatal blow.

13. In this analysis we are of the view that the Petition is well-founded and its merits are unassailable. We are not required to make any observations on the findings of the Court of Inquiry for the reason that its proceedings are totally vitiated because of non-adherence to Army Rule 180. We are of the same opinion and conclusion as our esteemed Brothers of the Division Bench in ***SAHNI*** were, viz. that the Respondents cannot take any action against the Petitioner on the basis of the subject Court of Inquiry. The Respondents are, however, within their rights to proceed on the basis of the Show Cause Notice dated 15.6.2007, with the clarification that until conclusive findings are available against the Petitioner neither punitive nor administrative action can be taken against him. Recourse to the provision of Rule 22 is available to the Respondents. Since there was no evidence available for revoking the favourable selection of the Petitioner by the SSB, approved by the ACC, the Revocation Order is quashed. The Respondents are directed to give effect to the approval of the SSB, held in April, 2006 and duly approved thereafter by the ACC.

14. Keeping in perspective the pronouncement in ***SAHNI*** case we are of the view that there is no substance or merit in the

defence or opposition presented by the Respondents. Any reasonable person would have realised that the Petitioner is better placed than Lt. General Sahni and that the conclusion of the Division Bench in ***SAHNI*** would apply *a fortiori* in favour of the Petitioner.

15. The Writ Petition is allowed in the above terms. All applications stand disposed of. The Respondents shall, therefore, be liable to pay costs of the Petition which we quantify at Rs.25,000/-.

(VIKRAMAJIT SEN)
JUDGE

(S.L. BHAYANA)
JUDGE

September 03, 2007
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